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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOTTIE PRATT AND JOANN ALRED,

Petitioners,

v.

JACK SHOEMATE, SUPERINTENDENT OF THE OSAGE INDIAN AGENCY; JAMES WATT, SECRETARY OF THE INTERIOR; JOSEPH LEE SHUNKAMOLAH, JR.; GLADYS BELLE ROUWALK; MARGARET CECILIA ROUWALK; CECIL FRANK ROUWALK; JOSEPH LEE SHUNKAMOLAH; MICHAEL STEVEN PRATT TOYEBO AND ETHEL CAROL ROUWALK, LEGATEES, DEVISEES AND HEIRS OF THE DECEDENT, MARGARET SHUNKAMOLAH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS, GLADYS BELLE ROUWALK, MARGARET CECILIA ROUWALK, CECIL FRANK ROUWALK, ETHEL CAROL ROUWALK AND MICHAEL STEVEN PRATT TOYEBO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondents submit that the only valid question presented for review by Petitioners to this Court is whether the United States Court of Appeals for the Tenth Circuit decided the present case in a way in conflict with the decision of this Court in *Tooahnippah v. Hickel*, 397 U.S. 598 (1970).

Petitioners' *Question Presented* (Petition for Writ of Certiorari at (i)) is otherwise contrary to and in violation of Supreme Court Rules 21.1(a) and 34.6.

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Respondents.

BRIEF OF NON-GOVERNMENTAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

By this brief, the following non-governmental Respondents, Gladys Belle Rouwalk, Margaret Cecilia Rouwalk, Cecil Frank Rouwalk, Ethel Carol Rouwalk and Michael Steven Pratt Toyebo (hereinafter collectively referred to as "Respondents"), submit their opposition to the Petition for Writ of Certiorari filed herein by the Petitioners, Lottie Pratt and JoAnn Alred (hereinafter collectively referred to as the "Petitioners").

STATEMENT OF THE CASE

Under Supreme Court Rule 34.2, these Respondents take exception to the *Statement of the Case* set forth in Petitioners' Petition for Writ of Certiorari (Petition for Writ of Certiorari at pps. 3-17)[1], and hereby submit their own statement of the case before the Court.[2]

The Court has for determination a Petition for Writ of Certiorari from a decision of the United States Court of Appeals for the Tenth Circuit, affirming the decisions of (i) the United States District Court for the Northern District of Oklahoma, (ii) the United States Department of Interior, Regional Solicitor's Office, Southwest Region, and (iii) the Superintendent of the Osage Agency, Bureau of Indian Affairs. Petitioners contest the testate disposition of the estate of Margaret Shunkamolah, a full blood Osage Indian.

Margaret Shunkamolah, Osage Allottee No. 71 (hereinafter referred to as the "Testatrix"), died testate on January 16, 1981, a resident of Osage County, Oklahoma and seized of substantial restricted property, consisting primarily of a 3.59166 interest in an Osage headright, valued at $690,891.78, and $115,722.08 in cash. The devolution of the described estate of the Testatrix was subject to the supervision of the Osage Agency, Bureau of Indian Affairs. The Last Will and Testament of the Testatrix, dated April 17, 1978, and the Codicil

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[1] Consistent with Petitioners' erroneous appellate procedures at each stage of the appellate review of this case, Petitioners' *Statement of the Case* (Petition for Writ of Certiorari, pps. 3-17) is argumentative and is in essence Petitioners' *Arguments* to the Court in support of their Petition for Writ of Certiorari.

[2] Unless otherwise designated, these Respondents shall make reference to those documents attached as an Appendix to Petitioners' Writ for Petition of Certiorari, *e.g.* (Petitioners' Appendix, p.).

thereto, dated July 22, 1978 (hereinafter referred to as the "Will" and "Codicil") were filed for approval with the Osage Agency, Bureau of Indian Affairs. The Will, as modified by the Codicil, devised the property of the Testatrix as follows:

> To son Joseph Lee Shunkamolah, Jr. — .59166 Osage headright interest;
>
> To daughter Gladys Belle Rouwalk — two (2) Osage headrights;
>
> To daughter Lottie A. Pratt — $5.00;
>
> To daughter JoAnn Shunkamolah Alred — $5.00;
>
> To granddaughter Margaret Cecilia Rouwalk — $5,000;
>
> To granddaughter Ethel Carol Rouwalk — $5,000;
>
> To grandson Cecil Frank Rouwalk — $5,000;
>
> To grandson Joseph Lee Shunkamolah — $5,000;
>
> To grandson Fred Shunkamolah — $5,000;
>
> To great-grandson Michael Steven Pratt Toyebo — $5,000;
>
> To granddaughters Margaret Cecilia Rouwalk and Ethel Carol Rouwalk — equally, household and personal effects;
>
> To grandchildren Margaret Cecilia Rouwalk, Ethel Carol Rouwalk, Cecil Frank Rouwalk — equally one (1) Osage headright; and
>
> To daughter Gladys Belle Rouwalk — residue of real and personal property.
>
> LOTTIE A. PRATT, daughter, the sum of $5.00. The reasons that I give only $5.00 to Lottie Pratt is because I have heretofore in my lifetime, given her forty (40) acres, with a home thereon and improvements thereon.

Further, I have given Lottie an additional one hundred twenty (120) acres of pasture land. I supported Lottie A. Pratt, my daughter, and her three (3) sons for 19 years; providing all of the food, utilities, cost of transportation and have given automobiles to her children, in order that they could commute from Oklahoma Military Academy and other schools to Lottie's home, and I have provided during the 19 years for numerous trips and vacations for Lottie and her three sons, therefore, she has been well provided for during my lifetime.

JoANN SHUNKAMOLAH ALRED, daughter, the sum of $5.00. JoAnn has been given by me, for many years, help with her support, upkeep, transportation and the purchase of automobiles. JoAnn filed a lawsuit in the District Court, Osage County, against me, which not only defamed my reputation, but it caused me great embarrassment and humiliation, and I then stopped giving her any more money. She has been hateful, mean, hostile and ugly toward me. I do not understand why she felt this way toward me, after I brought her into this life and helped her for so many years. This explains why I am only giving her $5.00 under this my Last Will and Testament. (Petitioners' Appendix, pps. 76-77)

On the basis of the division of property as set forth above, approval of the Will and Codicil thereto was contested by the Petitioners.

On March 17, 1981, the Field Solicitor, Pawhuska Field Office, as the designated Special Attorney for the Osage Agency, Bureau of Indian Affairs (hereinafter referred to as the "Field Solicitor"), conducted hearings of record as to the validity of the Will and Codicil thereto. These hearings were pursuant to the provisions of Section 8 of the Act of April 18, 1912, 37 Stat. 86, 88, as amended by Section 5(a) of the Act of

October 21, 1978, 92 Stat. 1660, 1661 (hereinafter referred to, unless specifically cited, as the "Act of 1912", the "Act of 1978", or collectively as the "Osage Acts") and pursuant to regulations implementing the Osage Acts published by the Secretary of the Interior at 25 C.F.R. §§ 17.1-17.14.

Following several days of hearings on the record, the Field Solicitor by his memorandum of October 22, 1982 transmitted the record of the hearings to the Superintendent of the Osage Agency, Bureau of Indian Affairs (hereinafter referred to as the "Superintendent"). Findings and Conclusions were set forth in the memorandum and recommendations were made that the Superintendent determine the Testatrix' Will and Codicil to be valid and approve them for admission to probate.

By Order dated October 22, 1982, the Superintendent approved the Will and Codicil of the Testatrix. (Petitioners' Appendix pps. 1-32) Upon appeal by Petitioners of the Superintendent's decision to the United States Department of Interior, the record was transmitted to the Regional Solicitor, Southwest Region, for his review and decision pursuant to authority delegated by the Secretary of the Interior to the Solicitor of the Department of Interior and redelegated by the Solicitor to the Regional Solicitor (hereinafter the "Regional Solicitor").

In his decision of July 27, 1983, the Regional Solicitor found, *inter alia*, on behalf of the Secretary of Interior as follows:

(a) that the Will and Codicil thereto were executed in accordance with the laws of Oklahoma;

(b) that under the laws of Oklahoma, the Testatrix was mentally competent at the time she executed the Will and Codicil;

(c) that the record of hearings did not contain sufficient probative evidence of undue influence to invalidate the Will and Codicil; and

(d) that the Will reflected a rational testamentary scheme for the disposition of the Testatrix' property. (Petitioners' Appendix, pps. 33-53)

Accordingly, the decision of the Regional Solicitor affirmed the Order of the Superintendent approving the Will and Codicil for submission to probate thereof. Motions for reconsideration were urged by Petitioners, which were denied by the Regional Solicitor.

Thereafter, on August 25, 1983 the Petitioners filed their appeal from the decision of the Secretary of Interior with the United States District Court for the Northern District of Oklahoma, pursuant to the provisions of the Act of 1978.

Following an exhaustive review of the voluminous record, pleadings and briefs in the case, United States District Court Judge, James O. Ellison, determined by Memorandum Opinion dated November 27, 1985:

(a) that the Petitioners' [referred to as "Contestants" below] allegations challenging the federal statutes comprising the Osage Indian testamentary legislation failed to support a finding that such legislation is unconstitutional;

(b) that the findings of the Department of Interior that (i) the Testatrix had sufficient testamentary capacity, (ii) the Will and Codicil were executed in accordance with Oklahoma law, and (iii) the Will and Codicil were not the products of undue influence were not against the clear weight of evidence or erroneous in law; and

(c) that the decision of the United States Supreme Court in *Tooahnippah v. Hickel, infra,* does not change the burden

of proof in a contested will case, nor give the Secretary of Interior the right to deny a Will on the basis of inequity or unfairness to an Indian heir. (Petitioners' Appendix, pps. 73-85).

Judgment was entered by the United States District Court for the Northern District of Oklahoma on November 27, 1985, affirming the decisions of the Department of Interior. Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on December 13, 1985 and December 23, 1985 respectively.

Following the submission of written briefs and subsequent oral arguments on November 17, 1986, the United States Court of Appeals for the Tenth Circuit, in affirming the decision of the United States District Court for the Northern District of Oklahoma, found:

(a) that federal legislation (i.e. the Osage Acts) regulating the administration of restricted Indian estates is constitutional, and in particular, that Section 5(a) of the Act of 1978 was not unconstitutionally vague;

(b) that the decision of the Supreme Court of the United States in *Tooahnippah v. Hickel, infra,* did not require that Oklahoma common law in regard to will execution and testamentary capacity be supplemented with special "heir-protective" presumptions; and

(c) that neither the decision of the United States District Court for the Northern District of Oklahoma, nor the findings of the United States Department of Interior were against the clear weight of the evidence or erroneous in law. (Petitioners' Appendix, pps. 86-88)

Thereafter, the United States Court of Appeals for the Tenth Circuit, by an Order dated February 4, 1987, denied Petitioners' Petition for Rehearing and issued its mandate to the

United States District Court for the Northern District of Oklahoma. (Petitioners' Appendix, pps. 89-90) Petitioners have filed on or about April 29, 1987 their Petition for Writ of Certiorari before this Court.

SUMMARY OF RESPONDENTS' ARGUMENTS

This Court in *Tooahnippah v. Hickel,* 397 U.S. 598 (1970) provided that (i) an administrative decision of the Secretary of Interior regarding the testate devolution of Indian property is subject to judicial review by the federal courts, and (ii) the Secretary of Interior was not vested with power to revoke or rewrite a will which reflected a rational testamentary scheme based upon that governmental official's concept of equity.

The decisions of the United States Court of Appeals for the Tenth Circuit, as well as the United States District Court for the Northern District of Oklahoma were correct in their scope of judicial review of this case, and were neither inconsistent nor contrary to the holdings of this Court in *Tooahnippah v. Hickel, supra.*

RESPONDENTS' ARGUMENTS

Initially, these Respondents would submit that the arguments of Petitioners set forth under subsections B, C and D of Petitioners' *Statement of the Case* (Petition for Writ of Certiorari, pps. 8-17)[3] are erroneous and outside the proper question presented to this Court, inasmuch as said subsections attempt

[3] Petitioners' Petition for Writ of Certiorari does not contain a direct and concise argument section amplifying the reasons relied on for allowance of the writ, as specified by Supreme Court Rule 21.1(j), but rather all arguments are presented in Petitioners' *Statement of the Case.* (Petition for Writ of Certiorari, pps. 3-17)

to address issues of clear weight of evidence and Oklahoma common law concerning execution of wills.

Subsection A of Petitioners' *Statement of the Case* (Petition for Writ of Certiorari, pps. 3-8) attempts to frame the only appealable issue of the purported conflict between the decision of the United States Court of Appeals for the Tenth Circuit in this case and the decision of this Court in *Tooahnippah v. Hickel, supra.* Petitioners propound that *Tooahnippah, supra* created special "heir-protective" presumptions in such Indian will cases, which upon application according to Petitioners would not only allow the Secretary of Interior to disapprove a will based upon his own subjective concepts of equity but actually *require* the Secretary of Interior to disapprove a will whose dispositive provisions are in any manner contrary to the devolution of the estate under intestate succession, regardless of the existence of a rational testamentary scheme to the will. (Petition for Writ of Certiorari, pps. 4-8)

In order to advance their argument, Petitioners have looked not to the majority opinion of the *Tooahnippah* Court, but rather have extracted isolated phrases from Justice Harlan's separate concurring opinion therein (397 U.S. at 611-619). In doing so, Petitioners have taken liberties with such concurring opinion and attempted to create a stare decisis effect to their interpretation thereof.[4]

The unreported opinions of both The United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit addressed the application of *Tooahnippah v. Hickel, supra,* to the case at hand, and in particular Petitioners' reliance upon the separate

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[4] It has long been established that "concurring opinions" have no legal effect and are in no way binding upon any court. *Alaska v. Troy,* 258 U.S. 101 (1922), and its progeny.

concurring opinion of Justice Harlan. (Petitioners' Appendix, pps. 74-88)

In his Memorandum Opinion dated November 26, 1986, District Court Judge, James O. Ellison opined:

> "This decision [*Tooahnippah, citation omitted*] dealing with non-Osage Indians, if applicable and analogous to the 1978 Osage Act, does no more than require a careful consideration of the evidence in the type of case enumerated above. This decision does not change the burden of proof in a contested will case nor does it give the Secretary [of Interior] the right to deny a will because he feels it is unfair to an Indian heir. In fact, the holding in *Tooahnippah* specifically prohibits the Secretary from exercising his independent judgment as to the fairness of the will provision. This Court finds that the decision of the Secretary is not against the clear weight of the evidence and is not erroneous in law. The decision is affirmed." (Petitioners' Appendix pps. 84-85)

Likewise, Circuit Court Judge, Stephanie K. Seymour, writing for the three-judge panel assigned by the United States Court of Appeals for the Tenth Circuit to this case, stated in the Order and Judgment filed November 21, 1986:

> "Contestants [Petitioners herein] further contend that special federally-created presumptions and burdens of proof favoring Indian heirs preempt Oklahoma common law in regard to will execution and testamentary capacity. We find no evidence in the 1978 Act language or the legislative history that Congress intended to supplement the Oklahoma standards adopted in Section 5(a) with special 'heir-protective' presumptions. Nor does *Tooahnippah v. Hickel* [*citation omitted*] dictate such a result. When Congress passed the 1912 Act to permit Osage wills, it favored freedom of testation. In the present case, in which all devises were made

to descendants of the testatrix, we have no reason to believe that Congress did not consider Oklahoma statutory and common law fully adequate for determining the validity of the will." (Petitioners' Appendix, p. 88)

These Respondents submit that the rational testamentary scheme of the Will and Codicil, especially the dispositive provisions thereof as to the Petitioners, is consistent with the ruling of the *Tooahnippah* Court, wherein at page 610 it states in pertinent part:

"Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U.S.C. § 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not 'just and equitable' . . . . . *cf. Attocknie V. Udall*, 261 F. Supp. 876 (D.C.W.D. Okl. 1966), reversed on other grounds, 390 F. 2d 636 (C.A. 10th Cir.), cert. denied, 393 U.S. 833, 89 S. Ct. 104, 21 L. Ed. 2d 104 (1968)."

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit in this case is in full accord with this Court's ruling in *Tooahnippah v. Hickel, supra*, both as to the extent and scope of judicial review by the lower federal courts sitting in their appellate capacity, as well as to the issue of the responsibility of the Secretary of Interior in such Indian will cases.

Accordingly, these Respondents respectively request that the Petition for Writ of Certiorari filed herein by Petitioners be denied for failure to present an appealable issue to this Court.

Respectfully submitted,
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